

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Duane G. Krzysik, et al. Art Unit 1615
Serial No. 10/659,967
Filed September 11, 2003
Confirmation No. 5034
For SKIN CARE TOPICAL OINTMENT

December 27, 2007

TO THE COMMISSIONER OF PATENTS AND TRADEMARKS,
SIR:

REPLY BRIEF

In response to the Examiner's Answer dated November 2, 2007, please consider the following remarks.

Rejection of Claims 1, 3, 5-13, 15-18, 21, and 27 under 35 U.S.C. §103(a) as being unpatentable over EP 047144 ('144) in view of Morrison and further in view of Grollier, et al.

In the Examiner's Answer, the Office states that Applicants' argument that the triblock copolymers as required for the rheology enhancers of instant claim 1 provide improved functional properties to the topical ointment that cannot be achieved with the diblock copolymers of the '144 reference is not persuasive as the features upon which Applicants rely (i.e., functional properties based on instant triblock copolymers) are not recited in the rejected claims. Thus, Applicants' arguments based on improved functional properties, which accrue from the instant triblock copolymers is not persuasive since Applicants' arguments do not establish the

scope of the claims being present. With all due respect, Applicants disagree and assert that the Office has misunderstood Applicants' argument.

An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of the case. The common sense of those skilled in the art can demonstrate why some modifications and/or combinations would have been obvious where others would not.¹ As noted in the Examination Guidelines For Determining Obviousness Under 35 U.S.C. §103(a) in view of the Supreme Court decision in *KSR Int'l Co. v. Teleflex, Inc., et al.*², the Office must provide an explanation to support any obviousness rejection. As noted in Applicants' Appeal Brief submitted July 13, 2007, the Office has failed to meet its burden under numbers (1) and/or (2) above, as the cited references, alone or in combination, fail to disclose each and every limitation of Applicants' amended claim 1, and there is no apparent reason to combine the references to arrive at each and every limitation of Applicants' amended claim 1. It simply would not have been obvious to one skilled in the art to arrive at Applicants' claimed combinations.

Specifically, in Applicants' Appeal Brief submitted July 13, 2007, the '144 reference fails to teach or suggest the rheology enhancers as required in Applicants' instant claim 1. More particularly, claim 1 requires rheology enhancers including combinations with triblock copolymers as compared to the diblock copolymers of '144. As such,

¹ *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, No. 06-1402 (Fed. Cir. May 9, 2007) See also *KSR Int'l Co. v. Teleflex, Inc., et al.* 550 US_____, 2007 WL 1237837 at 12 (2007).

² 550 US_____, 2007 WL 1237837 at 12 (2007)

the '144 reference fails to teach or suggest each and every limitation of Applicants' claimed invention as required for a *prima facie* case of obviousness under MPEP §2143.

Furthermore, there is no suggestion to modify the '144 reference to arrive at the specific rheology enhancers of claim 1. Specifically, one factor to consider in showing non-obviousness in accordance with the Examination Guidelines in view of *KSR International Co. v. Teleflex, Inc.*, and as specifically noted by the Office in the Advisory action dated March 2, 2007, is that of superior results³; that is, if Applicants' claimed invention shows unexpected or superior results as compared to that disclosed in the cited art reference(s), this points to the claimed invention not being obviousness in view of the cited reference. As noted in Applicants' Appeal Brief, the triblock copolymers used for the rheology enhancers of Applicants' claim 1 provide improved functional properties (i.e., superior results) to the topical ointment as compared to the diblock copolymers of the '144 reference.

Specifically, as noted in the Appeal Brief, Applicants assert that the triblock copolymer are surprisingly superior rheology enhancers as these copolymers produce a gelled or film-forming composition, allowing the composition to easily transfer from an absorbent article such as a diaper to form a film-like barrier layer on the skin, thereby protecting the skin from water and moisture, which can cause diaper rash and irritation. Diblock copolymers (such as the styrene-ethylene-propylene copolymers, available as Kraton 1701X, of the '144 reference) are not as effective in forming a film-like

³ Examination Guidelines set forth by the Office on October 10, 2007.

barrier as diblock copolymers are produced in chains of polymers.

In Examiner's Answer, the Office states that the '144 reference discloses that its compositions offer desirable characteristics, such as leaving a smooth texture upon application to the skin and being easily spreadable, which are the same objectives desired by Applicants' invention. While the compositions of '144 are intended to provide smooth texture and be easily spreadable, Applicants' assert that the compositions of instant claim 1 provide superior results as compared to the compositions of '144.

Specifically, in contrast to the Examiner's Answer, Applicants are relying on the functional properties, not to show the cited references fail to teach each and every limitation (which, as noted in the Appeal Brief and above, the references do not), but to show that the instantly claimed rheology enhancers of instant claim 1 provide superior results as compared to the rheology enhancers taught in '144, and as such, the Office has not made a *prima facie* case of obviousness as required in MPEP §2143.

Furthermore, as argued in the Appeal Brief, the Morrison and Grollier, et al. references fail to overcome the above shortcomings. For the reasons set forth above, and in the Appeal Brief, it is not foreseeable or predictable that one skilled in the art would simply combine/modify the compositions of Morrison and/or Grollier, et al. references with the compositions of the '144 reference to arrive at the specific compositions of Applicant's claim 1. As such, Applicants respectfully assert that the motivation suggested by the Office for combining the cited references does not meet the

requirements as set forth in the Office's guidelines for evaluating an obviousness rejection, and as such, claim 1, and the claims that depend therefrom, are patentable over the cited references.

In light of the foregoing (and the arguments made in the Appeal Brief dated July 13, 2007), Applicants request withdrawal of the rejections and allowance of all pending claims. The Commissioner is hereby authorized to charge any additional government fees which may be required to Deposit Account No. 01-2384.

Respectfully Submitted,

/Christopher M. Goff/

Christopher M. Goff, Reg. No. 41,785
ARMSTRONG TEASDALE LLP
One Metropolitan Square, 26th Floor
St. Louis, Missouri 63102
314-621-5070

CMG/JMB/tmg
Via EFS